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Administrative Agency Inaction: Misapplication of the Finality Doctrine—Sierra Club v. Gorsuch, 715 F.2d 653 (D.C. Cir. 1983)

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ADMINISTRATIVE AGENCY INACTION: MISAPPLICATION OF THE FINALITY DOCTRINE—*Sierra Club v. Gorsuch*, 715 F.2d 653 (D.C. Cir. 1983).

A critical issue in administrative law is the reviewability of agency action and inaction.[1] The issue of reviewability presents an important question regarding the proper role of courts in relation to administrative agencies. Courts must assure that administrative agencies fulfill their regulatory duties and yet must be aware that premature judicial intervention disrupts agency functions. The concern with premature judicial intervention is the basis of the finality doctrine.[2] Under this doctrine, a court has jurisdiction to review only final agency action.[3]

In *Sierra Club v. Gorsuch*,[4] the Court of Appeals for the District of Columbia addressed the reviewability of administrative inaction. The court held it could exercise jurisdiction to review inaction on an issue even though the agency insisted that the issue was still under study.[5] The agency inaction involved in *Sierra Club* was the Environmental Protection Agency's (EPA) failure to include strip mines on a list of pollutant sources subject to regulation under the Clean Air Act.[6] During the

1. The Administrative Procedure Act [hereinafter cited as APA] defines "agency action." It states " 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (1982). The term "agency action," therefore, includes every agency proceeding, action, and inaction.

On the subject of reviewability of agency action and inaction, see generally 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25 (2d ed. 1983); Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform and Legislative Oversight*, 4 U. DAYTON L. REV. 71 (1979); Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968); Ogden, *Judicial Control of Administrative Delay*, 3 U. DAYTON L. REV. 345 (1978); Comment, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983).

2. The terms reviewability, finality, ripeness, and exhaustion of remedies are often considered interchangeable. *See, e.g.*, Sierra Club v. Gorsuch, 715 F.2d 653, 657 (D.C. Cir. 1983) (finality is a question of ripeness); American Dairy of Evansville, Inc. v. Bergland, 627 F.2d 1252, 1260 (D.C. Cir.) (1980) (finality and exhaustion are inextricably intertwined); 4 K. DAVIS, *supra* note 1, at § 25:1 (ripeness overlaps reviewability and exhaustion). Although these doctrines are intertwined and are designed to avoid premature intervention into agency proceedings, *American Dairy*, 627 F.2d at 1260–61, they are analytically different. *See infra* text accompanying notes 71–74 regarding ripeness and finality.

3. *See infra* text accompanying notes 12–31. It is important to note that "final" inaction can take two forms: (1) refusal to promulgate a regulation, i.e., when an agency concludes a study and states that no regulation is forthcoming, *see infra* note 16; and (2) unreasonable delay in an agency process, i.e., when an agency is still studying an issue and a challenge is made to the reasonableness of that ongoing process. This second form of final inaction is discussed in this Note.

4. 715 F.2d 653 (D.C. Cir. 1983).

5. *Id.* at 657.

6. The Clean Air Act establishes a rigorous program for the regulation of existing and new sources of air pollution. The 1977 amendments to the Act contain provisions to "prevent significant deterioration" [hereinafter referred to as PSD] of air quality when air quality does not meet the

rulemaking process, the Sierra Club had urged that strip mines be included on the list of pollutant sources based on an EPA-commissioned study on the pollutant effects of the mines.[7] When the EPA published the list in final form, however, strip mines were omitted. The EPA did not rebut or discuss the strip mine study in its statement accompanying the published list.[8]

The Sierra Club petitioned the District of Columbia Court of Appeals for review of the agency's inaction on the strip mine issue. The EPA argued that it had not yet decided whether to regulate strip mines because it lacked techniques for measuring pollution from individual mines.[9] Thus, the EPA argued, there was no "final" agency decision with respect to strip mines, and the court lacked jurisdiction to review the omission of strip mines from the list.[10] In a two-to-one decision, the court rejected this argument. It directed the EPA to promptly consider the results of the EPA-commissioned study and determine whether strip mines should be added to the list of regulated sources. The EPA was to return to the court with final action on the issue of strip mine regulation.[11]

This Note first summarizes the finality doctrine, and then examines the *Sierra Club* court's misapplication of the finality analysis. The Note suggests an alternate analysis of the agency inaction in *Sierra Club* and proposes that such an analysis be applied in factual situations similar to that in *Sierra Club*.

I. THE FINALITY DOCTRINE

A court has jurisdiction to review only "final" agency action.[12]

statutory minimum. 42 U.S.C. §§ 7470–7479 (1982). The PSD provisions apply only to "major emitting facilities," which include sources that have the potential to emit 250 tons or more per year of any air pollutant. *Id.* at § 7479(1). For a thorough discussion of the Clean Air Act and its amendments, see Alabama Power Co. v. Costle, 636 F.2d 323, 346–55 (D.C. Cir 1979).

7. The EPA-commissioned study was known as the PEDCo Report. U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT NO. 908-I-78-003, SURVEY OF FUGITIVE DUST FROM COAL MINES (1978). According to the Sierra Club, the PEDCo Report indicated that most strip mines emit the 250-ton threshold amount of pollutants, *see supra* note 6; *Sierra Club*, 715 F.2d at 660.

8. The *Sierra Club* court criticized the agency and industry intervenors for failing to discount the Sierra Club's interpretation of the PEDCo Report that most strip mines would emit 250 tons of regulated pollutants. 715 F.2d at 660. Though the agency did not discount the Sierra Club's interpretation, the agency did provide a justification for its inaction—it lacked quantification techniques for applying PSD regulations to individual mines. *Id.* at 659.

9. *Id.*

10. For purposes of its argument, the EPA relied on the jurisdictional statement in the Clean Air Act. The Act vests jurisdiction in the court to review "final action" of the administrator, and action of the administrator concerning nationally applicable regulations. 42 U.S.C. § 7607(b)(1) (1982).

11. The *Sierra Club* court stated that it expected "final" action by the EPA within 90 days. 715 F.2d at 661 n.47.

12. This requirement is stated in the APA:

Assuming the issue is ripe and administrative remedies have been exhausted, once a court finds the requisite finality it must decide whether the agency acted arbitrarily or capriciously.[13] A key requirement of finality is that the agency process must have reached a stage where judicial review is not disruptive.[14] Courts have held agency action to be reviewable under three separate doctrines. First, agency action is final, and thus reviewable, when the agency makes a definitive statement of its position on an issue.[15] This usually occurs when an agency has concluded its study of a particular issue and thereafter publishes a regulation indicating its position. Agency action is also final when the agency states that it has concluded its study of a particular issue and that no regulation on that issue is forthcoming.[16]

Second, agency action is constructively final, and therefore reviewable, when there has been an unreasonable delay in the administrative process.[17] In this situation, the plaintiff must prove that the agency's delay is so extreme as to be equivalent to a refusal to act and that, despite the agency's assertion that it is still studying the issue, judicial interven-

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Agency action made reviewable by statute and "final" agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. § 704 (1982). The finality requirement is also embodied in most jurisdictional statements in statutes. *See, e.g., supra* note 10 regarding the jurisdictional statement in the Clean Air Act.

13. 5 U.S.C. § 706(2)(A) (1982) (court shall hold unlawful and set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). This is the appropriate standard for review of informal hearings unless otherwise required by statute. *See* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 335–36 (D.C. Cir. 1968).

14. American Dairy of Evansville, Inc. v. Bergland, 627 F.2d 1552, 1260 (D.C. Cir.) (1980).

15. *Compare,* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239–41 (1980) (FTC's issuance of complaint was not final agency action because complaint was not "definitive" statement of agency's position) *with* Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967) (FDA's publication of regulations was final agency action because regulations were "clearly definitive" statements of the agency's position).

16. *See, e.g.,* National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978) (court reviewed FCC's decision not to adopt certain program standards for TV broadcasters); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (court reviewed FCC's decision not to adopt rules proposed by public interest group to improve children's television).

17. The APA requires administrative agencies to complete actions "within a reasonable time," 5 U.S.C. §§ 555(b), 558(c) (1982) and authorizes courts to compel agency action "unlawfully withheld or unreasonably delayed." *Id.* § 706(1) (1982). A finding of "final" agency action based on unreasonable delay requires three steps. First, a court must define what is a delayed or abnormal time period for the agency's action. Second, the court must determine whether the objecting party has been prejudiced by the delayed action. Finally, a court must ascertain whether the agency's justifications for delay are sufficient to preclude judicial intervention at that time. Ogden, *Judicial Control of Administrative Delay, supra* note 1, at 357.

After concluding there is an unreasonable delay, a court may employ a variety of remedies: the court can impose a timetable on the agency, remand the issue and require the agency to decide the issue promptly, or order the agency to enter the delayed decision. *Id.* at 376–82.

tion is appropriate. Factors that have led courts to find a delay unreasonable are an imminent threat to public health,[18] a significant time lapse,[19] and the expiration of a statutory timetable.[20]

Third, the Supreme Court has adopted a pragmatic, case-by-case approach to determine when agency action is reviewable. This pragmatic approach, first developed in *Abbott Laboratories v. Gardner*,[21] uses a balancing approach and considers the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[22] Courts have made clear that even under this "pragmatic approach" judicial intervention in incomplete administrative proceedings must remain the exception and not the rule.[23]

This pragmatic approach incorporates the finality doctrine by requiring that agency action be fit for review. Courts decide whether issues are fit for review on a case-by-case basis.[24] The main focus of the pragmatic approach, however, is on "ripeness" rather than "finality."[25] Though courts often use the terms interchangeably, there is a difference between the doctrines. The ripeness requirement is a self-imposed limitation, focusing on whether judicial interference is desirable, whereas finality is a jurisdictional prerequisite.[26]

Courts have given several justifications for the finality doctrine. First, it conserves judicial resources. By withholding judicial review until final agency action, a court may avoid needless intervention because the

18. *See* Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1157 (D.C. Cir. 1983) ("[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake"); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (agency had less discretion to control decision timetable on suspension of DDT because of threat of an "imminent hazard").

19. *See* Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975) (nine years is an adequate period for any agency to decide almost any issue.) *But see* FTC v. Weingarten, Inc., 336 F.2d 687, 692 (5th Cir. 1964) (unreasonable delay cannot be established by the mere passage of time), *cert. denied*, 380 U.S. 908 (1965).

20. Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978). In *Caswell*, the court held there was an unreasonable delay because the agency had not made welfare benefit decisions within a 90-day time period. The court defined 90 days as a "reasonable" time by relying on an analogous provision in the Social Security Act. *Id.* at 17.

21. 387 U.S. 136 (1967). In *Abbott*, manufacturers of prescription drugs challenged regulations promulgated to implement an amendment to the Federal Food, Drug and Cosmetic Act. *Id.* at 137. Although the regulations had not been enforced against any manufacturers, the Court held that the regulations were reviewable. The Court concluded that the issue was both "final" and "ripe" for review. *Abbott*, 387 U.S. at 149–51.

22. *Abbott*, 387 U.S. at 149.

23. *See* Gulf Oil Corp. v. United States Dept. of Energy, 663 F.2d 296, 312 (D.C. Cir. 1981) (*quoting* Nader v. Volpe, 466 F.2d 261, 268 (D.C. Cir. 1972)).

24. *See infra* text accompanying notes 49–52.

25. *Abbott*, 387 U.S. at 148 (discussing the pragmatic test as one of "ripeness").

26. *See supra* notes 10 and 12, discussing jurisdictional nature of finality.

complainant may succeed in the administrative process.[27] Even if the complainant is not successful in the agency process, "final" agency action provides for more simplified and focused issues, which expedites review.[28]

Judicial nonintervention also permits the agency the opportunity to correct its own mistakes and apply its expertise.[29] Administrative agencies are created to deal with complex social problems and are equipped with specialized staff to accomplish this goal. Finally, the finality requirement preserves the stature and continuing effectiveness of an agency.[30] If finality were not required, complainants would be encouraged to ignore agency procedures and immediately turn to the courts for redress.[31] Thus, the doctrine acknowledges trust in administrative agencies to solve a problem and to solve it properly.

II. THE *SIERRA CLUB* COURT'S REASONING

In *Sierra Club,* the court acknowledged the EPA's claim that the issue of strip mines was still under study.[32] The court, however, exercised jurisdiction on the basis of "final" agency action.[33] The court reasoned: (1) the EPA conducted rulemaking in which strip mines were in issue; (2) thereafter, the EPA promulgated regulations, consisting of a list of pollutant sources which would be subject to regulation under the Clean Air Act; (3) this list of regulated sources became "final" when published in the Federal Register; and (4) the Sierra Club challenged the EPA's list of sources *"as promulgated."*[34]

Because the Sierra Club challenged the list *"as promulgated,"* the court concluded that it had jurisdiction to review the strip mine issue because strip mines were not included on this "final" list of regulated pollution sources.[35] Thus, the court found the requisite finality to review the strip mine issue by focusing on whether there was some regulation

27. *See* FTC v. Standard Oil, 449 U.S. 232, 242 (1980) (intervention "leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary."); *see also* McGee v. United States, 402 U.S. 479, 484 (1971) (same under exhaustion of remedies analysis).

28. *See* 4 K. DAVIS, *supra* note 1, at x25:11 ("[n]o court should decide an issue that has not been properly clarified").

29. *Standard Oil,* 449 U.S. at 242.

30. McKart v. United States, 395 U.S. 185, 195 (1969) (expressing same principles with respect to the exhaustion doctrine).

31. *Id.*

32. 715 F.2d at 658.

33. *Id.* at 657.

34. *Id.*

35. *Id.*

promulgated by the EPA as a result of a decisionmaking process in which strip mines were an issue, rather than focusing on whether the strip mine issue was final. The court used a semantic argument rather than logical analysis of the challenged issue, strip mine regulation, to find the required finality to assume jurisdiction.

The *Sierra Club* court stated that the EPA's contention that final action had not been taken did not affect its jurisdiction but did affect its standard of review.[36] The court limited its review to examining the agency's reasons for the deferred action.[37] The court did not accept the EPA's "lack of quantification techniques" justification for not including strip mines on the published list of pollutant sources. Nevertheless, the court was unwilling to determine whether the EPA had acted arbitrarily and capriciously.[38] Instead, it remanded the record for reconsideration by the EPA regarding whether strip mines should be included in the list of pollutant sources regulated by the Clean Air Act.

The dissent argued that the appropriate analysis was whether there was an unreasonable delay by the EPA, given the EPA's justifications.[39] Using this analysis, the dissent believed the delay in regulating strip mines was reasonable.[40]

III. ANALYSIS

The *Sierra Club* court misapplied the finality doctrine to the EPA's inaction on the strip mine issue. The court used the *Abbott* pragmatic approach[41] to review the agency inaction but did not apply it properly. This led to inconsistencies in the court's opinion and resulted in an unwarranted judicial intrusion into the agency's decisionmaking process. The *Sierra Club* court could have better analyzed the EPA's inaction by using an unreasonable delay analysis instead of the *Abbott* pragmatic approach.

The *Sierra Club* court based its jurisdiction on "final" agency action.[42] Final agency action can be based on an agency's definitive position on an issue or an unreasonable delay. Furthermore, pragmatic considerations may justify review.[43] The court acknowledged that the EPA had not taken a definitive position on the strip mine issue.[44] It also stated

36. *Id.* at 658.
37. *Id.* at 659.
38. *Id.* at 661.
39. *Id.*
40. *Id.* at 662.
41. *Id.* at 657.
42. *See supra* text accompanying notes 32–34.
43. *See supra* text accompanying notes 21–22.
44. 715 F.2d at 658.

that the question of unreasonable delay was not properly before it.[45] Therefore, the only possible justification for the court's assumption of jurisdiction is that it applied the pragmatic approach to review of the EPA's inaction.[46]

The pragmatic approach is a case-by-case method with a two prong test.[47] A court must first evaluate the "fitness" of the issue for judicial decision. Second, the court must consider the hardship to the parties of withholding court evaluation, and the degree of interference with the agency's decisionmaking process.[48] The *Sierra Club* court failed to properly consider these elements.

A. The First Prong—Fitness of the Issue for Judicial Resolution

Courts determine whether an issue is fit for review by using a case-by-case analysis. The Supreme Court found *Abbott* fit for judicial resolution because the disputed issue was a purely legal one.[49] However, in a companion case to *Abbott, Toilet Goods Association v. Gardner,*[50] the Court determined that merely framing an issue to present a legal question did not make the issue fit for review.[51] Rather, the court indicated that fitness involves an evaluation of many factors, such as whether adequate specific information is before the court, and whether the court can adequately deal with the legal issue.[52]

The *Sierra Club* court did attempt to comply with *Abbott* by phrasing the issue in terms of a legal question: Given the agency's criteria for placing a pollutant source on the list, should strip mines have been

45. *See id.* at 657 n.29. The Sierra Club argued that the court should treat the EPA's delay as equivalent to a decision not to regulate and therefore subject to review. The court, however, rejected this theory because the Sierra Club had no "new evidence" to present to the EPA. *Id.* The court took a very narrow view of the word "delay." The court suggested there was no delay by the EPA because it was not conducting any rulemaking on strip mines at the time. The court's analysis is confusing because unreasonable delay is often found when an agency has done nothing.

46. The *Sierra Club* court stated that the "requirement of finality is in essence a question of ripeness, focusing on the appropriateness of the issues presented for judicial review." 715 F.2d at 657. The court then referred to the *Abbott* pragmatic approach. *Id.*

47. *See supra* text accompanying notes 21–22.

48. The *Sierra Club* court discussed the *Abbott* pragmatic approach as involving only an analysis of fitness and hardship. However, consideration of the degree of interference which will result from judicial intervention has always been an underlying factor. *See Standard Oil,* 449 U.S. at 243 (1980).

49. In a brief analysis of fitness, the Court concluded the issue was a legal one: whether the FDA amendment was properly construed by the agency. *Abbott,* 387 U.S. at 149; see *supra* note 21 for the facts of *Abbott.*

50. 387 U.S. 158 (1967). In *Toilet Goods,* cosmetic manufacturers brought suit on the ground that regulations promulgated were beyond the agency's power under the statute; the Court held that the issue was not reviewable because it was not ripe. *Id.* at 159–64.

51. *Id.* at 163.

52. *See id.* at 164.

included?[53] As the Court in *Toilet Goods* stated, however, mere phrasing of the issue in terms of a legal question is insufficient to make an issue fit for review. In *Sierra Club*, there was persuasive evidence that the issue was not fit for review.

First, the *Sierra Club* court did not even analyze the "fitness" of the issue of including strip mines on the EPA's list. Instead, it focused on the fitness of challenging the promulgated regulations which listed pollutants that the EPA had decided to regulate.[54] The court failed to differentiate between fitness with respect to the promulgated regulations, which was not an issue, and fitness with respect to the noninclusion of strip mines, which was an issue. The EPA had taken a definitive position on regulating certain pollutants. Because that issue would have been fit, the court would have had jurisdiction to review a challenge to the regulation of one of those pollutants. The court also would have had jurisdiction to review the strip mine issue if the EPA had announced it would definitely not regulate strip mines. Because the EPA was still studying it, however, the issue of whether the EPA would include strip mines on its list was not fit and the court did not have jurisdiction for review.

The *Sierra Club* court's admission that it could not review the strip mine issue because of an inadequate record[55] further shows that the issue was not fit for review. After a court finds an issue reviewable, it decides whether the agency has acted arbitrarily or capriciously.[56] If the strip mine issue had been reviewable, the court's alternatives would have been either to uphold the EPA's omission of strip mines from the regulation as a valid decision or to order the regulation of strip mines because the omission was arbitrary and capricious.[57] The *Sierra Club* court did neither. It could only remand the case and "anticipate" final action within ninety days.[58]

B. The Second Prong—Hardship to the Parties and Degree of Interference

Hardship to the parties of withholding judicial review falls within the second prong of the pragmatic approach. The hardship inquiry also requires a case-by-case analysis. Courts generally require a showing of

53. 715 F.2d at 657.

54. *See supra* text accompanying notes 33–35.

55. 715 F.2d at 661.

56. With respect to the Clean Air Act, the standard of review is set forth in § 307(d)(9). 42 U.S.C. § 7607(d)(9)(A) (1982). It is the same standard as that set forth in the APA. 5 U.S.C. § 706(2)(A) (1982).

57. *See supra* note 13.

58. 715 F.2d at 661 n.47.

irreparable harm.[59] The hardship requirement has been met where: (1) regulations forced persons to "risk serious criminal and civil penalties" for noncompliance;[60] and (2) public health and safety were threatened by imminent exposure to harmful chemicals.[61]

In *Sierra Club,* the petitioners failed to show that "irreparable harm" would result if the court withheld review. At most, the petitioners could show that one study, the PEDCo Report, indicated that small strip mines, and presumably larger ones, surpassed the Clean Air Act's 250-ton threshold requirement for regulation.[62] Furthermore, the petitioners agreed with the agency's and intervenor's position that only respirable particles are harmful, and that strip mine emissions consist mainly of larger particles.[63]

The *Sierra Club* court's only justification for not properly applying the hardship requirement was that it feared that the EPA was seeking to escape judicial review by insisting that the strip mine issue was still under study.[64] The court substituted this suspicion for the hardship requirement. It supported this position by relying on *Environmental Defense Fund, Inc. v. Ruckelshaus.*[65] That case, however, can be distinquished from *Sierra Club.* In *EDF v. Ruckelshaus,* though the court stated that it would not allow an agency to escape review by delaying its determination indefinitely, the hardship requirement was met because there was an imminent threat to public health.[66] Thus, imminent threat to public health coupled with a court's suspicion that the agency is avoiding review may be a sufficient basis for review. The court in *EDF v. Ruckelshaus* did not, however, suggest that suspicion alone is sufficient to justify review.

The pragmatic approach also considers the degree with which judicial intervention will interfere with the proper functioning of an agency. In *Sierra Club,* several factors indicate that the court's decision was a

59. *See, e.g.,* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980) (not reviewable because no irreparable injury); *Toilet Goods,* 387 U.S. at 164–65 (not reviewable because no irremediable adverse consequences).

60. *Abbott,* 387 U.S. 137, 153 (regulation requires an immediate and significant change in plaintiffs' affairs, with serious penalties attached to noncompliance).

61. *See, e.g.,* Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (court had jurisdiction to review agency action where record indicated persons were probably subject to grave danger from exposure to chemicals); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (court had jurisdiction to review agency action where record indicated that there was an imminent threat to public health as a result of the use of DDT).

62. *Sierra Club,* 715 F.2d at 659.

63. *Id.* at 660 n.44. The Sierra Club did argue, however, that many mines' respirable pollution exceeded the 250 ton limit. *Id.*

64. "Judicial review of decisions not to regulate must not be frustrated by *blind* acceptance of an agency's claim that a decision is still under study." *Id.* at 659 (emphasis in original).

65. 439 F.2d 584 (D.C. Cir. 1971).

66. *Id.* at 592.

significant interference with the EPA's functioning. First, though the court did not rule on the substantive issue of strip mine regulation, it did interfere with the agency's decisionmaking process by ordering the agency to decide the issue in ninety days. Second, the stature of the EPA was affected. The *Sierra Club* court implied distrust of the EPA and, as a result of the court's unwarranted assumption of jurisdiction, environmental groups will be prompted to circumvent the agency process. Petitioners will be encouraged not to wait for the agency's final decision but to seek redress in the courts as the Sierra Club did.

In sum, the *Sierra Club* court failed to properly apply the pragmatic approach to review. It also failed to adequately consider the impact of judicial review on the agency's process. Though the court did not carry its finding of jurisdiction to a logical conclusion,[67] the case is important because a logical extension of the court's analysis would be to order the EPA to regulate strip mines. Thus, the decision may result in unwarranted substitutions of the courts' judgment for an agency's judgment.[68]

IV. AN UNREASONABLE DELAY ANALYSIS

The *Sierra Club* court should have analyzed the EPA's inaction by using an unreasonable delay analysis,[69] which is the established method for determining when inaction is sufficiently final to warrant review.[70] The pragmatic approach, if applied correctly, could be an adequate analysis for review of agency inaction. The unreasonable delay analysis is preferable, however, for two reasons. First, it focuses more specifically on the issue of "finality of inaction." If the *Sierra Club* court had applied an unreasonable delay analysis, it would have had to focus on the relevant issue—inaction on the issue of strip mine regulation—rather than using a semantic argument.

Second, an unreasonable delay analysis is considered a "finality," and

67. *See supra* text accompanying notes 38 and 57.

68. A court may substitute its judgment for the agency's in some instances. For example, when there is final agency action, a court may hold that the agency's action was arbitrary and strike the regulation. This is appropriate because the court is fulfilling its supervisory role of assuring that agencies meet their regulatory duties. It is inappropriate, however, for a court to substitute its judgment for the agency's at intermediate stages in the agency process. The agency, like a trial court, applies a statute in the first instance. A court, therefore, is not assuming a proper role when it reviews agency action that is not final. If an agency is not acting fast enough, deadlines should be imposed by Congress, not the courts.

69. For a discussion of the unreasonable delay analysis, see *supra* note 17.

70. Most courts when confronted with a challenge to agency inaction have used an unreasonable delay analysis. *See, e.g.*, Public Citizen Health Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983); British Airways Bd. v. Port Auth., 564 F.2d 1002 (2d Cir. 1977); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

therefore a jurisdictional, determination. In contrast, a "ripeness" approach focuses more on the desirability of court review. The *Sierra Club* court stated that the determination of finality is in essence a question of ripeness.[71] Ripeness and finality, though they overlap, should be analyzed separately. While agency action may be final, it will not necessarily be ripe.[72] Whether the agency action is sufficiently final is the first determination, whether it is ripe for review is a second, independent determination. If the *Sierra Club* court had emphasized the jurisdictional issue involved rather than its suspicion, it would not have interfered with the EPA as it did.

The decision in *Abbott* demonstrates the distinction between ripeness and finality. In *Abbott,* the agency had made a definitive statement of its position on the challenged issue. The relevant question was whether judicial review was appropriate when the agency had not enforced the regulation against the petitioner.[73] Finality was not an issue because the agency had concluded its studies and rulemaking with respect to the challenged issue. In *Abbott,* the true question was ripeness.[74]

It is possible that the *Sierra Club* court was attempting to apply an unreasonable delay analysis. If so, the court's analysis is ambiguous because it discussed unreasonable delay in its analysis of the "scope of review" rather than in its analysis of jurisdiction.[75] An unreasonable delay analysis is a basis for concluding that a court has jurisdiction. The question of unreasonable delay, therefore, was moot after the *Sierra Club* court had found it could review by using the *Abbott* pragmatic test. The result in *Sierra Club* is, however, more consistent with an unreasonable delay analysis. Once a court finds an unreasonable delay, it can do what the *Sierra Club* court did: remand to the agency for prompt consideration.[76]

If the *Sierra Club* court had used an unreasonable delay analysis, it would have required the Sierra Club to prove that the EPA's delay in regulating strip mines was so extreme as to be equivalent to a refusal to

71. 715 F.2d at 657.

72. For example, in *Toilet Goods,* discussed *supra* at text accompanying notes 50–52, the Court stated that though the regulation being challenged was final, it was not ripe for review. 387 U.S. at 162 (no question that it is "final agency action").

73. 387 U.S. at 146.

74. There is a definite overlap between the *Abbott* pragmatic test and the unreasonable delay analysis: the *Abbott* approach is primarily concerned with irremediable harm, *see supra* text accompanying note 59, and the unreasonable delay analysis is primarily concerned with threat to public health and safety, *see supra* note 18. In fact, therefore, both tests have "hardship" as an important element.

75. *See supra* text accompanying notes 36–37.

76. *See supra* note 17 regarding the remedies a court may employ after finding there has been an unreasonable delay in agency action.

act. The Sierra Club could have argued that the period of time since the EPA regulated other pollutants[77] evidenced a refusal to act in regulating strip mines. The Sierra Club also could have argued that the absence of strip mine regulation created an imminent threat to public health.[78] Even applying the unreasonable delay analysis, however, the *Sierra Club* court probably would not have had jurisdiction because the EPA's justification for not regulating strip mines at the time[79] made the delay a reasonable one.[80]

V. CONCLUSION

The *Sierra Club* court misapplied the finality doctrine to agency inaction. The court was suspicious of the agency's inaction and wanted to assume jurisdiction. The court, however, recognized that an order to the agency to regulate strip mines would be an invasion of the agency's authority. To assume jurisdiction, therefore, the court used the *Abbott* pragmatic approach combined with a semantic argument of finality. If the court had used an unreasonable delay analysis, it would have focused on the proper issue: Had the EPA so unreasonably delayed regulating strip mines as to have made a final agency action, which would warrant review? This would have led to a more logical analysis and conclusion by the *Sierra Club* court.

Jacqualee Story

77. The time lapse since the promulgation of regulations for other pollutants was over 11 months. *Sierra Club*, 715 F.2d at 661.

78. *See supra* text accompanying notes 62–63.

79. *See supra* note 8 (explains the EPA's justification for not regulating strip mines).

80. *See Sierra Club*, 715 F.2d at 662 (MacKinnon, J., dissenting).